(33)

In the Supreme Court of the United States

October Term 1944

No. 98

No. 99

JOHN W. ROXBOROUGH,
EVERETT I. WATSON,
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

Respondent's Brief Opposing Petitions for Writs of Certiorari to Supreme Court of the State of Michigan.

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Respondent's Brief Opposing Petition for Certiorari.[1]

I

Opinions of the Courts Below

Counsel has supplied the correct citation to the official report of the opinions of the court below, both in No. 98 (People v. Roxborough, 307 Mich. 575) and in No. 99 (People v. Watson, 307 Mich. 596), but attention should

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[1]
Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed 'Transcript of Record'.

be directed as well to other companion cases decided the same date, and based upon the same record:

People v. Ryan, 307 Mich. 610,
People v. Reading, 307 Mich. 616,
People v. Ryckman, 307 Mich. 631.

II

Jurisdiction.

It is said the jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USC, § 344).[2]

III

Objections to Affidavits.

We record on the threshold our objections to inclusion in each petition and brief, of a certain document[3] which might be termed an 'affidavit of merits', reciting that the deponent 'firmly believes that the proofs adduced by the people at said trial (he not having taken the stand or put in any proofs on his own behalf, on ad-

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[2]

Whether such a short statement (p. 9 of each petition) constitutes full compliance with Revised Rule 12, we do not venture to say, leaving the matter to judicial discretion.

[3]

No. 98, Appendix A-1, pp. 21-22;
No. 99, Appendix A, pp. 20-21.

vice of his then counsel) did not prove him guilty of the charge on which he was convicted, and that his conviction was a gross miscarriage of justice'.

Each petitioner professes to have 'a good and valid defense' and strong faith in his ability to prove his innocence 'beyond any question of doubt'; and 'while willing and anxious to testify in his own behalf' at the trial, his then counsel (mistakenly) refused to permit him to do so.

The state supreme court found (80-82) upon review of the voluminous record in No. 98, that 'the testimony of the various witnesses presented questions of fact for consideration by the jury and the record contains sufficient testimony from which the jury could find Roxborough guilty as charged' (82).

In No. 99, counsel did not press the question involving weight of the evidence, but merely urged that proof of venue had not been established (Watson main brief, pp. 100-115), and the court below did not discuss the general question of sufficiency of proof (93-100).

Were such affidavits as we find here, designed merely to support applications for stays of the proceedings below, they might be in order to show good faith, but we find no authority for their inclusion otherwise, and, since questions of fact may not ordinarily be resolved in certiorari proceedings, we are puzzled to know why they were filed. We respectfully submit they should be stricken.

IV

Counter-Statement of Case.

With the exceptions presently noted, supplying omissions and correcting inaccuracies (Rule 27-4), we accept each petitioner's 'Statement of Case'.

It should be observed at the outset, in fairness to the State of Michigan, that certain negro defendants as well as white ones, charged in the information, were acquitted (74). [4]

First: We might, for sake of further clarity, add to counsel's careful summary of Count Two of the information (23-27), the statement that those charged with conspiracy therein, included many among whom the following were alleged to have played these roles:

1. **Duncan C. McCrea,** prosecuting attorney of Wayne county, accused of having conspired to accept bribes; [5]

2. **Richard W. Reading,** mayor of the city of Detroit, charged as such and duly convicted of conspiring to obtain bribes for the protection of those illegally

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[4]
The statement of the trial judge (73-74) to this effect has not been challenged.

[5]
While not put to trial in this cause, McCrea had been tried and convicted of a similar and connected offense. Affirmed, 303 Mich. 213; certiorari denied, 318 U. S. 783.

engaged in the promotion, management, etc., of lottery or gift enterprises for money, commonly known as 'policy' or 'numbers' (conviction affirmed, 307 Mich. 616);

3. **John P. McCarthy,**
Arthur Ryckman, *et al.,* police officers of the city of Detroit, charged and convicted of such conspiracy (affirmed, 307 Mich. 631);

4. **Elmer Ryan,** the proprietor of such a lottery or gift enterprise, charged and convicted of conspiracy to corrupt the aforesaid public officials (affirmed, 307 Mich. 610);

6. **John W. Roxborough (No. 98),**
Everett I. Watson (No. 99), *et al.,* proprietors of such lottery or gift enterprises, also charged and convicted of conspiracy to corrupt these public officials.

Roxborough (No. 98) and Watson (No. 99) alone seek certiorari to review the judgment of the supreme court of the State of Michigan.

Second: It is important, we think, clearly to understand 'the state in the proceedings in the court of first instance . . . . . at which, and the manner in which, the federal questions sought to be reviewed here were raised' (Rule 12).

1. There is nothing in the transcript of record, or in the certified original record, to indicate that during the three weeks in which the trial jury was chosen, and the peremptory challenges were interposed by the prosecu-

tion, any objections to the procedure were raised by counsel for these petitioners, on the ground that they were denied due process or equal protection of the law, or, for that matter, on any other ground, nor did counsel deem it of sufficient importance to include in the settled record any of the voir dire examination. [6]

2. The question involving peremptory challenges was first raised when, on the 9th day of October 1941, the trial having been in progress two days (7-8), the defendants Arthur Ryckman and five other respondents (not negroes) filed a 'Motion for Mistrial' (123) in their own behalf, on the ground, among several others, that 'the exercise of peremptory challenges in the selection of a jury by the prosecution was in pursuance of a premeditated and studied plan of procedure by the state to bar any negro venireman from serving on said jury', and that such procedure 'resulted in irreparable jury to the defendants herein and particularly to those defendants who are members of the negro race' (124).

The defendants who raised such objections were not negroes, and the certified original record (126-129) does not disclose that petitioners' counsel, who did represent negroes, joined therein, or that they filed a similar motion for mistrial. But it does show that, at the same time, petitioners' counsel stressed a quite different point, and based their objections on the opening statement of the special assistant prosecuting attorney (121-123).

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[6]

It may be noted that the petitioners do not claim that they were represented by incompetent counsel; and the certified original record shows that such counsel were most diligent in advocating their cause.

3. Counsel does not state, in either petition, that the prosecutor, in making his opening statement (49-50), said:

> "And, incidentally, in this case, we are going to present to you the facts, the cold facts, as the witnesses understand them, and I will say to you now, a lot of you sat on this jury for a long time watching the selection of this jury, please at no time draw the color line, and don't (49) think that we do. We are here to present this case purely and simply on the facts and if we prove it beyond a reasonable doubt, you have a certain duty to perform and if we don't, you have another duty to perform. But don't misunderstand the situation which you have watched day in and day out as you sat in this jury box and don't draw the color line for one single second against a single defendant sitting out there in that audience. We want this case to be decided on the facts. If they are guilty, we want justice done to them, and if they are not guilty, we want them out on the street walking around" (50).

Whereupon, counsel representing certain of the petitioners, objected to the remarks on the ground that they were argumentative, and the prosecuting attorney pursued the matter no further (50).

4. At the close of the people's proofs (certified original record, 1386), counsel for Watson (No. 99) moved for a directed verdict on several grounds, but, though opportunity was available, he did not urge the point now presented (50-51); and at the same time, counsel for Roxborough (No. 98) made much the same motion (51-

52), but without mentioning the subject of peremptory challenges.

5. Nor does the petition for Roxborough (No. 98), or Watson (No. 99), disclose that the prosecuting attorney stated, in his argument to the jury, as follows (53):

> "And I repeat to you what I have said in my opening statement, two months and four days ago, let no man be convicted because of race or color or creed. Take each man, put him along side of the other fellow and judge his case, and whether he is a black man or a white man, if you think he isn't guilty, acquit him. And you will never hear me say anything".

Or that the trial judge, when instructing the jury, said (53):

> "Justice knows no favorites and shows no partiality. It makes no distinction because of race or color and it draws no line of demarcation between the rich and the poor. Its purpose is to render unto every man that which he justly deserves".

6. The jury's verdict was rendered on the 15th day of December 1941 (57), and, on the 14th day of January 1942, the defendants Arthur Ryckman *et al.* filed a motion for new trial (certified original record, 2354-2356), assigning as error the trial court's denial of their motion for mistrial on the ground that the prosecuting attorney, in exercising his peremptory challenges against every negro venireman, had violated constitutional principles.

On the same day, petitioner Watson (No. 99), through his counsel, filed a motion for new trial (63-64), but he did not see fit to raise the federal question.

Roxborough's (No. 98) motion for new trial (58-60) is also dated the 14th day of January 1942 (60), but it does not appear to have been filed until the 19th day of February 1942 (58). Counsel did not raise the question involving peremptory challenges at this time.

Finally, on the 19th day of February 1942, counsel for Roxborough filed his supplemental motion for new trial (60-63) in which, for the first time, he raised the question now presented, based on the affidavit of a newspaperman, one John R. Williams (62-63).

Watson (No. 99) does not appear to have taken this step, and, so far as the records disclose, he did not see fit to do so until he appealed to the state supreme court, when he assigned the matter as error (assignment No. 47, at the very close of such assignments [43]).

V

Questions Presented.

On the basis of the record, the 'Question Presented', as stated by petitioners' counsel, is founded on a faulty premise, and is over-simplified.

As we view it, the question, so defined, divides, and may be restated as follows:

1. Should this Court, in their discretion, issue a writ of certiorari to consider a federal question which (although examined and decided by the highest state court) was not raised by the petitioner Roxborough (No. 98) in the trial court until he filed a supplemental motion for new trial, and which was never raised by the petitioner Watson (No. 99) in the court of first instance, it further appearing that the trial on a charge of conspiracy involving the negro petitioners with several prominent white public officials (who were also convicted), pursued its course for upwards of two months, without objection or exception on petitioners' behalf to the peremptory challenges of the prosecution?

2. Does the supporting affidavit of John R. Williams, attached to Roxborough's supplemental motion for new trial (62) in No. 98, firmly establish the fact that the prosecuting attorney deliberately challenged every qualified negro venireman '*solely* because of his race or color'?

3. Is there any substance in the claim that each of the petitioners was deprived of due process and that he was denied equal protection of the law (14th Amendment, § 1) by means of the statutory peremptory challenges exercised by the prosecuting officer in excusing from the trial jury all qualified negro veniremen, solely because of his race or color?

VI

Summary of Argument.

Introduction.

Since the sovereign State of Michigan stands indicted in this Court upon the grave charge of denying due process to citizens accused of crime, it is important to remember that she is accompanied by strong presumptions of innocence, and it is not to be assumed that any of her officers have violated constitutional guarantees.

This is definitely not a case in which negroes were tried in an atmosphere of hostility, unrepresented by competent counsel, nor does it present the situation encountered in States where members of that race are treated as an 'oppressed minority'. [7]

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[7]

Public policy in Michigan, as declared by the legislature, recognizes fully the obligation of the 14th Amendment:

1. The school code provides that 'no separate school or department shall be kept for any person or persons on account of race or color' (2 Comp. Laws 1929, § 7368 [Stat. Ann. § 15.380]).

2. Our general insurance law prohibits any life insurance company from making any distinction or discrimination between 'white persons and colored persons, wholly or partially of African descent' (3 Comp. Laws 1929, § 12457 [Stat. Ann. § 24.293]).

3. The 'civil rights' chapter of Michigan's penal code, provides for full and equal accommodations to 'all persons' (Act No. 328, Pub. Acts 1931 [Stat. Ann. § 28.343]).

4. And § 148 of that chapter provides that 'no citizen . . . . . possessing other qualifications, ... shall be disqualified to serve as grand or petit jurors in any court . . . . . on account of race or color' . . . . . (Stat. Ann. § 28.345).

Petitioners were tried with other negroes, who were acquitted, and with many prominent white officials who with them and others were together convicted of the offense charged in the information.

As the trial court remarked (73-74), in denying a new trial (64-78), 'there was no color line or distinction drawn by the jury'.

Nor is there a satisfactory record of the number of peremptory challenges exercised by either side, which might indicate whether petitioners themselves challenged veniremen of their own race.

And, finally, the prosecuting attorney, in his opening statement (49) and closing argument (53), and the trial judge in his charge to the jury (53), cautioned them to decide the case on the facts, drawing no lines of race or color.

First: (Question 1). It will become clear upon consideration of the entire record and in contemplation of the federal question presented at this time, that petitioners, who were represented by some of the most capable counsel in their community, indulged afterthoughts when preparing their motions for new trial; that, although at 'the moment of contact', when the jury were being drawn, they had the matter in mind, [8] they were not sufficiently

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[8]

The petitions for certiorari (p. 3) aver that 'during this process (of drawing the jury) it became apparent that the prosecuting attorney was misusing the 325 peremptory challenges available to the people (unconstitutionally, petitioner claims) in pursuance of a premeditated and studied plan to obtain a jury of his own choosing and to bar all qualified negro veniremen from serving on the jury solely because of race'.

impressed by the supposed violation of their constitutional rights, to warrant a fervent protest, for they raised no objections at that crucial moment; and that, having been convicted by sufficient testimony, as found by the state supreme court, they then carefully combed the record to discover the constitutional point which they had overlooked; in short, they then sought to use constitutional guarantees as a club rather than as a shield.

We respectfully submit, in such circumstances, that the discretionary writ of certiorari should be denied.

Second: (Question 2). The affidavit upon which petitioners rely (62) falls far short of establishing any essential factor of racial discrimination, for it is quite evident that the prosecuting official was not guided by any racial prejudices which he might entertain, but that he was moved to exercise his lawful challenges, without assigning his reasons therefor, by the undisputed fact that both Roxborough and Watson, the defendants, were large-scale operators of numbers, policy and other illegal enterprises, that they employed great numbers of colored folk in their respective organizations, and that their illicit games of chance were patronized by members of their race.

Third: (Question 3). The State does not deny a negro charged with crime, due process or equal protection of the law, in the selection of a petit jury from a panel on which that race is represented, where, under a valid statute conferring mutual rights of peremptory challenge, both accuser and accused may reject a specified number of veniremen, without assigning reasons therefor.

This Court, in their decisions, have never upheld the claim of right to have members of one's own race upon a jury (see authorities cited in the argument which follows).

The core of the matter is, we think, found in one short sentence taken from the opinion of the supreme judicial court of New Hampshire in a case cited and relied upon by petitioners,

State v. Wilson, 48 N.H. 398, 399.

> "An *impartial* jury is all that the respondent is entitled to under the constitution. 'He cannot claim the right to be tried by a *partial* jury' ".

VII

Argument.

Point One

The discretionary writ of certiorari should be denied those who raised the federal question as an afterthought in moving for a new trial in the court of first instance.

The 'moment of contact', if any, between the Constitution and state officialdom, occurred (if it did, and this we deny) when the jury was being drawn from a panel which included qualified negro veniremen.

Petitioners concede, in their applications for certiorari (pp. 3-4), that 'during this process *it became apparent* that the prosecuting attorney was misusing the 325 peremptory challenges available to the people (unconstitutionally, petitioner claims) in pursuance of a premeditated and studied plan to obtain a jury of his own choosing and to bar all qualified negro veniremen from serving on the jury solely because of race'.

If, as petitioners aver (petitions, p. 3), this supposed violation of their constitutional rights, then 'became apparent', why did their counsel fail to protest in open court, or, if they did, why did they not, in settling their record on appeal, include therein a transcript of the voir dire examination?

While it is true that other counsel, representing respondents of the white race, filed a motion for mistrial on this ground (123-124), the petitioners, who were members of the African race, did not join therein, and they failed to file or otherwise make a similar motion.

The foregoing motion for mistrial, in behalf of white defendants, came shortly after the prosecuting attorney had closed his opening statement to the jury (see, original certified record, pp. 121-128).

When the prosecutor ended his statement (idem., 121), counsel for Roxborough (No. 98) rose to ask the trial judge to declare a mistrial, 'for this reason, after the opening statement made by the prosecutor, it is utterly impossible that these defendants may obtain a fair trial from this jury'.

He continued:

> "There are two statments made by the prosecutor, I don't know and don't want to say that they were intentional, they may have been inadvertence, that four of the defendants charged here have pleaded guilty".

And the point was urged by this counsel with great fervor, concluding thus (idem., p. 122):

> "I say that in view of that fact, that it is impossible to even cure or rid from the minds of the jury the fact that the four defendants who are not on trial have pleaded guilty to this offense, which will give rise, without question, to an inference that there is some degree of guilt attached to these other defendants".

The motion was denied (id., 122), and the jury were later instructed (id., 128-129) to disregard the prosecutor's offer of proof that other defendants had pleaded guilty. And it is to be remarked that counsel for Watson joined in this motion (id., 122).

Whereupon, counsel for respondents Rykman *et al.* presented their motion for mistrial (*supra*), and it was overruled (id., 128).

Counsel for petitioners, throughout these proceedings, maintained an absolute silence, and, although the opportunity was afforded them to protest, they raised no objections in respect of the people's peremptory challenges.

And this silence was maintained throughout a trial which lasted for upwards of two months; they did not call in question the procedure now complained of, when they moved for a directed verdict, or at the close of the case, or in their requests to charge, but they waited until they had been convicted, and until, after the lapse of weeks, they finally filed and presented a supplemental motion for a new trial.

While no one will dispute the fact that a court of law is the guardian of constitutional rights, it is also mere sportsmanship to expect that those who apprehend that those rights and privileges have been infringed will make timely protest, and, even when, at a much later stage of the proceedings, the constitutional rights are asserted, the State itself possesses some right itelf.

This trial, as we have noted, consumed over two months; hundreds of witnesses were sworn and testified; and it is obvious that, in the event of a new trial, the State might find it difficult, if not impossible, to reassemble its proofs, produce witnesses widely scattered, and, in this particular case, have the benefit of the service of counsel who have, meanwhile, entered other fields of professional endeavor. [9]

We, therefore, respectfully submit that, on this ground alone, the writ should be denied.

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[9]

The special assistant prosecuting attorney, who so ably represented the State in this case, has since become an honored member of the Wayne circuit court, and the assistant attorney general is now legal adviser to the governor of the State of Michigan.

Point Two

The affidavit, supporting Roxborough's supplemental motion for new trial, fails to establish racial discrimination.

Petitioners' claim that defendants of African racial descent were discriminated against (in violation of the equal protection clause of the 14th Amendment) is based upon an ex parte affidavit filed in support of Roxborough's supplemental motion for new trial (Watson did not raise the point in the court of first instance).

The affiant, John R. Williams, the editor of a weekly negro newspaper, relates a 'conference' (interview) which he says he had with the special assistant prosecuting attorney (outside the court room, apparently), during which Williams inquired how it happened that the prosecutor had continually for days excused only negro jurors who had been called for service (62).

We pause at this point long enough to observe that had the prosecutor been called as a witness in open court and asked this same question, he would not have been bound to reply unless commanded by the trial judge (who would have been in error in so doing). Nor was he bound to answer the reporter's question. It is, therefore, obvious that the alleged interview is of little, if any value as possessing probative force.

The prosecutor's reply to this question was as follows:

> "The Roxborough-Watson interest (s) are so wide that I prefer that I do not have any negroes on the jury and further practically every negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters".

Assuming that the motive of the prosecuting attorney may be made the subject of judicial inquiry, and assuming that the exercise of lawful peremptory challenges may in any circumstances form the basis of a claim that equal protection of the laws has been denied, we respectfully submit it is clear, in view of the authorities hereafter cited, that the affidavit (62) falls far short of establishing the essential factors of racial discrimination prescribed by the 14th Amendment.

Since petitioners Roxborough and Watson admittedly conducted illegal enterprises patronized by members of their race, and employed others of that group in their respective organizations, they should not be heard to complain of the exercise of peremptory challenges by the prosecution, for the purpose of eliminating from the jury those veniremen deemed to be prejudiced, and there is no evidence that the prosecutor excused such talesmen '*solely* because of their race or color'.

The affidavit of a newspaper reporter who alleges he obtained an interview with the prosecutor, does not prove, by any means, that members of the colored race were arbitrarily and systematically excluded from jury service, through deliberate design, much less '*solely because of their race or color*'. It utterly fails to show or indicate racial prejudice in the mind of the prosecutor, since his specific reasons for rejecting negro veniremen

rested on other and distinct grounds. Nor does it disclose any meretricious motives. It merely shows, if it proves anything, that members of the colored race were rejected, not 'solely because of their race or color', but because of the connections of Roxborough and Watson.

Point Three

There is no substance in the claim that exercise of the State's peremptory challenges violated any constitutional guarantees.

Our position may be stated thus:—since selection of a jury panel by commissioners who arbitrarily reject all those of a certain race, is not presently involved, and the right to exercise peremptory challenges is clear, and since a negro charged with crime possesses no fundamental right to a mixed jury, no constitutional privileges were infringed in the trial of these petitioners.

There is no claim here that negroes were systematically and arbitrarily excluded from the jury panel of Wayne county, indeed it would appear that more than 30 members of that race were on the panel from which the jury was chosen in this cause. The complaint is that such negroes were eliminated through peremptory challenges exercised by the prosecuting official.

The right accorded the State by its legislature, [10] as

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[10] Mich. Code of Criminal Procedure, Chap. 8, § 12 (3 Comp. Laws 1929, § 17305 [Stat. Ann. § 28.1035]).

well as the privilege granted accused persons by the same law, is founded on sound public policy,

> *United States v. Marchant,* 25 U.S. (12 Wheat.) 480, 482.

> "Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, *from his habits and associations* (emphasis supplied), and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted",

> *Hayes v. Mississippi,* 120 U.S. 68, 70.

See, also,

> *Spies v. United States,* 123 U.S. 131,
> *Pointer v. United States,* 151 U.S. 396.

Thus it becomes clear that whatever may motivate state or defense counsel, their reason for exercising a peremptory challenge is immaterial because under the law such a right may be exercised

> "according to the judgment, will, or caprice of the party entitled thereto without assigning any reason therefor, or being required to assign a reason therefor . . . . The right is not intended to enable a party to select particular juries but merely to exclude from the panel objectionable persons whom he is unable

> successfully to challenge for cause, or, as ordinarily expressed, the right is not to select but to reject .... Within the number allowed by law the right is absolute, and cannot be abridged or denied by any arbitrary rule of court as to the mode of impaneling a jury",
>
> 35 C.J. 405.

The question for decision is controlled by principles laid down by this Court shortly after ratification of the 14th Amendment (1868),

> *Strauder v. West Virginia* (1879), 100 U.S. 303,
> *Virginia v. Rives* (1879), 100 U.S. 313,
> *Ex Parte Virginia* (1879), 100 U.S. 339.

From those decisions (and many that followed), it clearly appears that the 'equal protection clause' of the 14th Amendment confers upon a negro charged with crime, no absolute fundamental right to have negroes on grand or petit jury, and it comes into play only when the accused can establish the fact that all members of his race are, through deliberate design, systematically and arbitrarily excluded from jury services, solely because of their race or color.

Once the members of a race are (both in law and administrative practice) given the right to representation on the jury lists, the constitutional guarantee of 'equal protection' is fulfilled by the State.

It logically follows that the States violates no constitutional guarantee found in the 14th Amendment, when,

under even-handed provisions of a code of criminal procedure, both accuser and accused may, without assigning reason or motive therefor, reject a prescribed number of talesmen in the exercise of lawful peremptory challenges (Code of Criminal Procedure, Chap. 8, § 12 [3 Comp. Laws 1929, § 17305 (Stat. Ann. § 28.1935)]).

And we respectfully submit that if there exists any valid reason for such exclusion, whether resident in the mind of the prosecutor or openly disclosed to the press, peremptory challenges so exercised do not violate the 'equal protection clause' of the 14th Amendment.

First: That this Court have in such cases applied the 'equal protection clause' only when it manifestly appears that a State has singled out and denied to colored citizens the right and privilege of participating in the administration of the law, as jurors, solely because of their color, though qualified in all other respects, clearly appears from their decisions which culminated in *Norris v. Alabama*, 294 U.S. 587 (discussed in our first brief, 191, 196).

And counsel has succeeded in finding no decision of the highest court in which it has been held that the 'equal protection clause' of the 14th Amendment in the slightest degree restricts a lawful right (given by the legislature) to reject through exercise of peremptory challenge any member (white or colored) of a mixed jury panel.

The case of *Norris, supra*, though given considerable publicity, rested on fundamental principles declared by the court shortly after ratification of the 14th Amendment in 1868.

In the leading case of *Strauder v. West Virginia, supra* (100 U.S. 303), a colored man indicted for murder moved the trial court to quash *venire* 'because the law under which it was issued was unconstitutional' (in conflict with the recently ratified 14th Amendment), and, on that ground, also sought removal of the cause to the circuit court of the United States (under the Federal 'civil rights' law [Rev. Stat. § 641]).

The law of the State to which reference was made (Acts of West Virginia, 1872-73, p. 102) provided:

> "All *white* male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided".

On appeal from the supreme court of appeals (who affirmed conviction), the underlying question defined by the supreme court of the United States, was 'whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury *selected and impanelled* without discrimination against his race or color, because of race or color'.

It was observed, however, at the very outset of the opinion (p. 305),

> "that the first of these questions is not whether a colored man, when an indictment has been performed against him, has a right to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is indicted or tried, all

> persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury''.

The questions were important (said the court) 'for they demand a construction of the recent amendments of the Constitution'. The Fourteenth Amendment 'was designed to assure to the colored race the enjoyment of all the civil rights that under the laws are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States'.

> ''What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?''

And the court then consider the effect of the law under scrutiny (p. 308):

> ''That the West Virginia statute respecting juries —the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted .... The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of law, as jurors, because of their color, though they are citizens, may be in other respects fully qualified, is practically a brand

upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others".

. . . . .

"(p. 309) . . . It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. . . . And how can it be maintained that compelling a colored man to submit to a trial for his life *by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone,* however well qualified in other respects, is not a denial to him of equal legal protection?" [Emphasis supplied].

In determining the limits of such protection, however, one should carefully consider the decision that immediately followed,

Virginia v. Rives, 100 U.S. 313.

The court, in that case, granted writ of *mandamus* commanding the judge of the district court (of the United States) of the western district of Virginia 'to cause to be re-delivered by the marshal of said district the bodies of' two colored men, one of whom had been convicted and sentenced for the crime of murder in the state court. In the other case the jury had disagreed.

It appeared that some time prior thereto, these men had been jointly tried and convicted, and the judgments set aside by the state court.

When this joint trial was held, the defendants moved the court that the *venire,* which was composed entirely of the white race, be modified so as to allow one-third to be composed of colored men, but this motion was overruled on the ground that the court 'had no authority to change the *venire,* it appearing (as the record stated) to the satisfaction of the court that the *venire* had been regularly drawn from the jurybox according to law'.

Thereupon, the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into the circuit court of the United States for the western district of Virginia.

That petition alleged, among other things, that 'by the laws of Virginia all male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and the laws of the state, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race'.

The state court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for the removal of the case was renewed, and again denied. The defendants were then tried separately,

one was convicted, and in the other case the jury disagreed.

> "In this stage of the proceedings a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the circuit court of the United States, ... and a writ of *habeas corpus cum causa* was issued, by virtue of which the defendants were taken . . . . into the custody of the United States marshal".

This Court held, in substance, that section 641 of the Revised Statutes (the 'civil rights act', so-called) did not require removal of a criminal case from a state to a Federal court, in such circumstances.

The important phase of the decision, however, deals with the claim that the defendants were entitled to a mixed jury:

> "Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the *venire,* by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by the law of the state, or by an act of Congress, or by the Fourteenth Amendment of the Constitution. It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or

property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the state court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by the Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment, or with the purview of sect. 641''.

Cf. *Ex Parte Virginia*, 100 U.S. 339.

At the next term of court (October 1880), it was held that 'the exclusion, because of their race and color, of citizens of African descent from the grand jury that found, and from the petit jury that was summoned to try, the indictment, *if made by the jury commissioners, without authority derived from the Constitution and laws of the State,* was a violation of the prisoner's right under the Constitution and laws of the United States, which the trial court was bound to redress' (Syl. 6), and that 'upon the showing made by the prisoner, the motions to quash the indictment and the panels of jurors should have been sustained', (Syl. 7),

Neal v. Delaware, 103 U.S. 370.

The general principle laid down in the case of *Neal, supra,* and followed in

Carter v. Texas, 177 U.S. 442, 447,

constitutes the underpinning of the decision rendered by the court in *Norris v. Alabama, supra* (294 U.S. 578). [11]

In *Martin v. Texas* (1905), 200 U.S. 316, the court again observed that an accused person cannot of right demand a mixed jury some of which shall be of his own race, nor is a jury of that kind guaranteed by the 14th Amendment.

Furthermore, it was said, in that case, that, while an accused person of African descent on trial in a state court is entitled under the Constitution of the United States to demand that '*in organizing the grand jury, and empanelling the petit jury,* there shall be exclusion of his race on account of race and color, such discrimination cannot be established by merely proving that no one of his race was on either of the juries; and motions to quash, based on alleged discriminations of that nature, must be supported by evidence introduced or by an actual offer of proof in regard thereto''.

To the same effect,

Thomas v. Texas, 212 U.S. 278.

It is plain that the case at bar does not come within

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[11]

"Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, and equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States", Carter v. Texas, supra.

the general principles declared by Mr. Chief Justice Hughes in

Norris v. Alabama, 294 U.S. 587,

when he said:

> "Summing up precisely the effect of earlier decisions of this court thus stated in *Carter v. Texas*, 177 U.S. 442, 447, in relation to exclusion from service on grand juries: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him' . . . . The principle is equally applicable to a similar exclusion of negroes from service on petit juries".

The facts involved at bar are not comparable to those considered by this Court in the case of *Norris*, for there, although the population of Morgan county, Alabama, in 1930 was 46,176, and of this number 8,311 were negroes, the Court observes:

> "Within the memory of witnesses, long resident there, no negro had ever served on a jury in that county or had been called for such service".

The *Norris* case was followed in

Hollins v. Oklahoma, 295 U.S. 394,

Where it is held that evidence sustained the contention that 'negroes *for a long period of time* had been excluded from jury service . . . . . *solely* on account of their race or color'. [Emphasis, ours].

Adhering to the principles laid down in former cases, including *Norris v. Alabama, supra,* the court, in

Hale v. Kentucky, 303 U.S. 613,

say:

> "We are of the opinion that the affidavits, which by the stipulation of the State were to be taken as proof, and were uncontroverted, sufficed to show *a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color,* constituting a denial of the equal protection of the laws guaranteed to petitioner by the Fourteenth Amendment". [Emphasis supplied].

In *Pierre v. Louisiana* (1938), 306 U.S. 354, it is held that 'when the jury commissioners of a state court *intentionally and systematically* exclude negroes from among the persons *summoned and listed for jury service,* an indictment for murder, returned against a negro by a grand jury *drawn or selected* from such lists, is void under the equal protection clause of the Fourteenth Amendment'. [Emphasis supplied].

And in *Smith v. Texas* (1940), 311 U.S. 128, reversing the conviction of a negro upon an indictment returned by the grand jury of a county in which, at the time of such return and long prior thereto, 'negroes were intentionally and systematically excluded from grand jury service,

solely on account of their race and color', the Court, speaking through Mr. Justice Black, say:

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list".

We have observed that counsel for appellant at bar have failed to cite any authority holding that the equal protection clause of the 14th Amendment may be violated through exercise of the lawful right of peremptory challenge.

Our research discloses but one case on this particular point, and that decision runs contrary to appellants' contention.

> *Whitney v. State*, (1901), 43 Tex. Cr. 197, 63 S.W. 879.

In harmony with the cases decided by this Court (from *Virginia v. Rives*, 100 U.S. 313, to and including the most recent of that time, *Carter v. Texas*, 177 U.S. 442) the Texas court held that 'on the issue of race discrimination, a negro on trial is not entitled, under the law, to such representation on the grand jury as the *pro rata*

of the negro race of the county bears to the *pro rata* of the white race in said county' (Syl. 2), and 'it was never intended by the Fourteenth Amendment to the Constitution of the United States to guarantee a negro defendant a full negro grand jury nor any particular number of grand jurors; but the intention was to prevent the intentional exclusion of negroes from the grand jury solely because of their race or color and thus deny an equal protection of law, in a criminal prosecution, of a person of the African race'.

The Court close their opinion by considering the question raised at bar:

> "We do not understand that any motion was made on the part of appellant to quash or abate the special *venire* summoned to try the case. It appears in the motion for new trial that there was three negroes on the panel to try defendant, *and these were peremptorily challenged by the State.* This, under our statute, the State had a perfect right to do without assigning any reason; *nor do we understand that this could be construed into any discrimination against the negro race. To so hold would be equivalent to guaranteeing a negro defendant a certain number of negroes on the jury to try him. We do not understand this to be the construction of the Fourteenth Amendment by the supreme court of the United States*".

Petitioners' counsel argue that, since the provisions of our code of criminal procedure, as applied at bar, give to the State the unfair advantage of 325 peremptory challenges exercised by the prosecuting attorney in a

case involving 65 defendants, to five peremptory challenges granted each of the petitioners (the accused); therefore, the statute, as applied, denies equal protection of the laws.

Laying aside the controlling fact that the constitutionality of this statute was not called in question in the court below until an application for rehearing was presented,[12] it would appear that these petitioners were accused with having conspired with 64 (or more) other defendants; that, with 22 others, they were convicted of such a conspiracy. If they chose to associate themselves with a large number of other persons in the one criminal enterprise, the fault of numbers is theirs and they must abide the consequences.

Moreover, the petitioners, although fully aware of the fact that they were jointly indicted with a large number of other persons, did not move the court to grant them a separate trial.

This right was statutory, the code providing that

> "when two [2] or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court",
>
> Code of Criminal Procedure, Chap. 8, § 5 (3 Comp. Laws 1929, § 17298 [Stat. Ann. § 28.1028]).

Thus it is manifest that petitioners 'slept on their rights' from the time the information was filed and un-

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[12] Herndon v. Georgia, 295 U.S. 441.

til one of them (Roxborough) filed his supplemental motion for a new trial; their counsel were somnolent when the opportunity to move for a separate trial went by, and when it 'became apparent' that constitutional rights were in jeopardy.

We respectfully submit that the result of petitioners' criminal association with members of a large group (though 65 in number), and their failure to assert their rights, should not now be charged against the people of the State of Michigan.

VIII

Conclusion

For the reasons assigned in our summary of the argument, and elsewhere in this brief, we respectfully submit that the pending applications should be denied.

Respectfully submitted,

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